

Supreme Court, U. S.

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MICHAEL ROSAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. **79-785**

ANN PEACHES, Petitioner

v.

CITY OF EVANSVILLE, INDIANA,
JOHN ZIRKELBACH, Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF INDIANA**

JOHN D. CLOUSE
MICHAEL C. KEATING
1004 Hulman Building
Evansville, Indiana 47708

JOHN F. DAVIS
504 Hulman Building
Evansville, Indiana 47708

RICHARD H. ADIN
4824 Lincoln Avenue
Evansville, Indiana 47715

November 13, 1979

COUNSEL FOR PETITIONER

Unigraphic, Inc., 1401 N. Fares Ave., Evansville, Ind. 47711, Phone 424-3680

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NO.

ANN PEACHES, Petitioner

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CITY OF EVANSVILLE, INDIANA,
JOHN ZIRKELBACH, Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals of Indiana

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

The petitioner, Ann Peaches, respectfully prays that
a writ of certiorari issue to review the opinion and judgment
of the Court of Appeals of Indiana entered in this pro-
ceedings on May 9, 1979.

OPINION BELOW

The opinion of the Court of Appeals of Indiana,
reported at 389 N.E. 2d 322, appears in Appendix A hereto.
In that court no separate judgment is entered, the opinion
serving as such. The Court of Appeals of Indiana on June

25, 1979 wrote an opinion denying petitioner's petition for rehearing, reported at 391 N.E. 2d 828 and appearing in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on May 9, 1979. A timely petition for rehearing was denied June 25, 1979. A timely petition to transfer the cause to the Supreme Court of Indiana was denied on September 21, 1979. (Appendix C) The Supreme Court of Indiana is the highest court in that state having jurisdiction to review decisions of lower state courts. (Indiana Rules of Appellate Procedure, Rule AP 11 [B].) This petition for certiorari will be filed within ninety (90) days of the Indiana Supreme Court's refusal to review or "transfer" the decision herein. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the refusal of a state court to apply the Federal Rules of Evidence in an action brought pursuant to 42 U.S.C. § 1983 constitutes a denial of Equal Protection and Due Process under the Fourteenth Amendment, and, further, violates the Constitution of the United States, Article 6 [2.] by making state law "supreme" over federal law.

2. Is the Federal Constitution (the relevant portions set out *infra*) violated by a state statute which permits a police officer to use deadly force against a fleeing felon, who has not used deadly force in the commission of the felony and whom the officer does not reasonably believe will use deadly force against the officer, or others, if not immediately apprehended?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States:

Article 6, [2.] :

"The constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Amendment 5:

"* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *"

Amendment 8:

"* * * nor cruel and unusual punishments inflicted."

Amendment 9:

"The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment 14:

"* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code, Title 42:

§ 1983, Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or territory, subjects, or causes to be subjected, any citizen of the United States or other person within jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Indiana Code:

35-1-19-3

"If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest." (Since repealed by the Indiana Acts of the General Assembly of 1976, P.L. 148, § 24, effective October 1, 1977)

STATEMENT OF THE CASE

The action was commenced on the 26th day of March, 1974 by the filing of petitioner's complaint in the Vanderburgh Superior Court of Vanderburgh County, Indiana. (R. 25. Note: references to the Record of the Proceedings on file in the Court of Appeals of Indiana will be shown thus "R. ") After preliminary pleading the petitioner filed an amended complaint. That charged that the respondent Zirkelbach, a police officer of the respondent City, "with a reckless disregard for his rights, shot and killed the said Walter Peaches, Jr." the petitioner's son. Count III of the amended complaint further alleged:

"2. That in the commission of said acts, complained of above, John Zirkelbach acted wrongfully, wantonly, knowingly, purposely, and with the specific intent to deprive plaintiff's decedent of his right to freedom from physical injury and death, these rights being secured by the provisions of the Eighth, Ninth and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1983." (R. 108-110)

After further pleading, the case was tried to a jury in the Vanderburgh Superior Court which trial resulted in a hung jury. (R. 230)

On motion of the respondents, the cause was venued to the Gibson Circuit Court of Gibson County, Indiana. (R. 244)

Various pre-trial proceedings were had in the Gibson Circuit Court, including the filing by plaintiff on January 20, 1978 of a "Motion to Have I.C. 35-1-19-3 Declared Unconstitutional as a Matter of Law." Since that raised a federal question here asserted, petitioner sets it out, omitting the formal parts:

"Comes now the plaintiff, Ann Peaches, by her attorneys, Richard H. Adin and Michael C. Keating, and move the Court to declare that I.C. 35-1-19-3 was unconstitutional on and before October 11, 1973 and that it was at all times

pertinent to this action unconstitutional and therefor inapplicable to the case at bar.

In support of this motion, the plaintiff would state:

1. That I.C. 35-1-19-3 read in full as follows:

'If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.'

2. That in the decision of *Mattis v. Schnarr*, (1976), 547 F.2d 1007, the U.S. Court of Appeals for the 8th Circuit held that Missouri's Statute authorizing an officer to use deadly force if 'necessary', V.A.M.S. § 544.190, which is worded identically to I.C. 35-1-19-3, was unconstitutional as a violation of the 5th and 14th Amendments to the U.S. Constitution due process right to life, stating at page 1009 of the Opinion:

'We hold the Statutes unconstitutional as applied to arrests in which an officer uses deadly force against a fleeing felon who has not used deadly force in the commission of the felony and whom the officer does not reasonably believe will use deadly force against the officer or others if not immediately apprehended.'

3. That the law in Indiana since 1927, as stated in *Durham v. State* (1927) 199 Ind. 567, 159 N.E. 145, was and is that an officer could use all the force that was reasonably necessary to arrest one guilty of a crime, even a misdemeanor, excepting that he could not kill him or inflict a great bodily harm endangering his life when he was fleeing.

WHEREFORE, the plaintiff requests the Court sustain plaintiff's motion to declare as unconstitutional I.C. 35-1-19-3 as regards the use of deadly force to make an arrest of an alleged fleeing felon, and that the Court thereby

prohibit the defendants from making reference to said law before the jury or the Court, such law, as a matter of law, not being a true and correct representation of the State of the law, said law being unconstitutional as in violation of the 5th and 14th Amendments to the U.S. Constitution."

This motion was denied by the court.

Petitioner also filed a "Motion to Use the Federal Rules of Evidence" on that same day. Again, since this raised a federal question argued here, she sets it out:

"Comes now the plaintiff, Ann Peaches, by her attorneys, Richard H. Adin and Michael C. Keating, and moves the Court to conduct the trial in the above matter in accordance with the Federal Rules of Evidence. In support of her motion, plaintiff would state to the Court as follows:

1. That Count III of the plaintiff's amended complaint filed February 17, 1977 is based on a Civil Rights action under the 8th, 9th, and 14th Amendments of the United States Constitution and 42 U.S.C. § 1983.

2. That in order to insure that the plaintiff's cause of action based on the above named Federal Rights and Guarantees are fully and completely litigated, it is necessary, where the Federal Rules of Evidence conflict with the Indiana State Rules of Evidence, that the Federal Rules of Evidence govern the admissibility of evidence.

3. That under the Supremacy Clause of the Constitution of the United States of America, Article VI § 2, Congress has enacted 42 U.S.C. § 1983 and in order to give full force and effect to said Statute, it is necessary that this proceeding be governed by the Federal Rules of Evidence which, had this action been filed in the Federal Court System, would have governed this action.

4. That to deny this motion would be to deprive the plaintiff of her 14th Amendment to the United States Constitution due process and equal protection rights, by discriminating under the Civil Rights act in limiting the manner and types of evidence that may be admissible, and that would be admissible had this action been filed in Federal Court.

WHEREFORE, the plaintiff prays that this Court sustain plaintiff's Motion and conduct the above captioned proceeding in accordance with the Federal Rules of Evidence and applicable to Civil Actions brought in the Federal Courts." (R. 259-161)

This motion similarly was denied. (R. 259)

The cause came on for trial to a jury commencing on February 21, 1978. (R. 299)

The evidence relevant to this petition may be summarized thus:

Walter Peaches, Jr. was the petitioner's son and contributed to the household expense. (R. 451) On the 10th day of October, 1973, the respondent Zirkelbach, a policeman on the respondent City's force, went into work at 11:00 p.m. (R. 478, 479) At 3:25 a.m. on that day, the police dispatcher radioed that there was a break-in in progress at the Out-Of-Sight Lounge. (A tavern) (R. 478-479) At that hour the Out-of-Sight Lounge was closed for business. (R. 480) Zirkelbach got out of the police car at the scene and saw two subjects come out of the gangway between a house and the Out-of-Sight Lounge and run. (R. 490) Zirkelbach shot standing with a shotgun at his shoulder. (R. 497) He testified that he shot to apprehend and if that meant killing the subjects, then that is what he intended to do. (R. 497) Another suspect came out the back of the Out-of-Sight Lounge and Zirkelbach fired at him. (R. 498) This suspect got away. (R. 499) Zirkelbach reloaded his handgun and then called for assistance. (R. 500) Ultimately, there were eight to ten policemen at the scene.

Zirkelbach went west on Canal Street to look for the other two who had gotten away. (R. 501) Walter Peaches, Jr. was found on the sidewalk after he made some noise that Zirkelbach heard. (R. 501) No attempt was made to give first aid by Zirkelbach or the other officers. (R. 502) Zirkelbach saw no weapon on Peaches. (R. 506)

The Evansville Police regulation then in effect, governing the apprehension of suspects, decreed that the police

could use deadly force and their weapons to apprehend a fleeing felon. (R. 504) The police were not allowed to shoot warning shots nor to shoot to wound. (R. 508) This regulation was a police department one permissible within state law. (R. 509)

The reason Zirkelbach did not try to run the suspects down was because he thought they were faster than he afoot. (R. 543) He could not leave his partner in an unknown situation -- there were plenty of houses and buildings in which a person could hide very quickly. (R. 543) He did not try to trap them because there was no place that he knew of in which to do so. (R. 544) If he called for assistance earlier, they would have gotten away. (R. 544) Zirkelbach yelled for the suspects to stop but they did not. (R. 545) His bullet killed Walter Peaches, Jr. (R. 547)

Zirkelbach testified that he could not have effectively called for assistance because the suspects were already outside the building. (R. 554, 555) The suspects had their backs toward him at all times while fleeing, except to turn. (R. 558)

Donald Boyd testified that he was standing in front of The Chicken Shack (restaurant) when Peaches was shot. (R. 561) He saw Peaches running down the street when he heard the shots. (R. 564) He did not hear the police shout anything. (R. 564) He saw Peaches come out from behind a filling station staggering, then he fell. (R. 566)

One Joseph Cosby testified that Paul Thomas, Peaches and he were behind the Out-of-Sight Lounge on the morning of October 11, 1973. (R. 737, 738) They were planning to break in and he was to be the lookout. (R. 738) He heard the police coming and yelled to Thomas and Peaches. (R. 742, 743) Peaches and Cosby started to run away. (R. 743, 744) He heard several shots and Peaches say that he was hit. (R. 745) He stated that Peaches and he were running right beside each other. (R. 745) He did not hear anyone yell "stop, police". (R. 746) Neither one of them turned around when they were running. (R. 751) All three were

unarmed. (R. 752) Cosby was charged with second degree burglary but the charges were to be dismissed if he would go into the service, which he did. (R. 753)

On February 24, 1978 the case went to the jury which returned a verdict for the respondents (R. 359) and judgment was accordingly entered. (R. 359)

Thereafter, the petitioner filed a motion to correct errors, the Indiana prerequisite to an appeal, and again raised the constitutional issues set out *supra*. (R. 363) That motion was denied (R. 367) and petitioner prosecuted her appeal to the Indiana Court of Appeals, again presenting the constitutional issues referred to hereinabove. This appeal was denied as petitioner has previously recited.

REASONS FOR GRANTING THE WRIT

1. The Indiana state court has decided a federal question of substance not in accord with the applicable decisions of this Court.

The refusal of the Indiana state court to apply the Federal Rules of Evidence in an action brought pursuant to 42 U.S.C. § 1983 constitutes a denial of Equal Protection under the Fourteenth Amendment and further violates the Constitution of the United States, Article 6 [2.] by making state law "supreme" over federal law.

The decision below has the effect of denying Due Process and Equal Protection under the Fourteenth Amendment by allowing inconsistent results to occur between jurisdictions due solely to differences in evidentiary codes or rules.

As Congress had the power to enact 42 U.S.C. § 1983, that statute became the law of the land. Article 6, Section [2.], Constitution of the United States; *McCulloch v. Maryland*, 4 Wheat. 316, 17 U.S. 311 (1819).

An action arising under a federal statute is governed by federal law and the rule of *Erie v. Thompson* does not

apply. *Erie Railroad Company v. Thompson*, 304 U.S. 64, 78 (1938); *Pritchard v. Smith*, 289 F.2d, 153, 154 (8th Cir. 1961). When a state court adjudicates federal law, the Supremacy Clause requires the application of federal law. *Ward v. Love County*, 253 U.S. 17 (1920); *Clafin v. Houseman*, 93 U.S. 130 (1876).

The express purpose of Section 1983 and its predecessors is to enforce the provisions of the Fourteenth Amendment. *District of Columbia v. Carter*, 409 U.S. 418, reh. den., 410 U.S. 959 (1973); *Mitchum v. Foster*, 407 U.S. 225 (1972); *Monroe v. Pope*, 365 U.S. 167 (1961).

By the trial court's denial of petitioner's motion to use the Federal Rules of Evidence and the subsequent use of Indiana rules of evidence, the trial court's ruling has the effect of possibly determining that the first person whose civil rights are violated cannot successfully prosecute a Section 1983 action, whereas the second, third or fourth person can. This is because under Indiana evidentiary law, subsequent conduct of the defendant, which tends to show a pattern of conduct on the part of such defendant, is inadmissible but prior conduct would be admissible. Contrast this Indiana rule with Federal Rules of Evidence, 404 (b) and 405 (b).

Indiana evidentiary law precludes the introduction of dying declarations in a civil action, but Federal Rule of Evidence 804 (b) (2) would admit such evidence as an exception to the hearsay rule.

Additionally, under Indiana rules, evidence of subsequent remedial measures are inadmissible for any purpose, but under Federal Rule of Evidence 407 such measures are admissible for certain purposes, including the feasibility of precautionary measures.

State courts must apply the Federal Rules of Evidence in Section 1983 actions to insure the uniform application of the Civil Rights Act throughout the United States and to further the intent of Congress that the Act be uniformly applied.

There is no direct authority for or against the proposition advanced by petitioner herein. However, the philosophy of the Supreme Court adopted in *Mondou v. New York, New Haven & Hartford Railway Company*, 223 U.S. 1, 57 (1912), regarding the Federal Employers Liability Act (FELA) is applicable to Section 1983. (See also: *Wilson v. Garnett*, 332 F. Supp. 888 [D.C. Mo. 1970], holding that the capacity to sue under the Federal Civil Rights Act is determined by Federal, not State Law; and *Anderson v. Haas*, 341 F.2d 497 [C.A.N.J., 1965], holding that for purposes of a Section 1983 action the validity of plaintiff's arrest by defendants must be determined by federal and not state, law).

Federal standards apply to the following issues where an action is based on federal law, regardless as to whether the action is brought in federal or state court; F.E.L.A. actions (*Mondou, supra*); sufficiency of the evidence (*Hommel v. Jackson-Atlantic, Inc.*, 438 F. 2d 307 [5th Cir., 1971]); capacity to sue (*Wilson, supra*); validity of arrest (*Anderson, supra*); and defenses of law enforcement officers in a Civil Rights action (*Qualls v. Parrish*, 534 F.2d 690 [C.A. Tenn., 1976]). There is no logical reason to apply federal standards and to, at the same time, allow state evidentiary codes to deny admission of evidence necessary to meet those standards.

Petitioner was denied Due Process of law by the effective foreclosure of petitioner's production of evidence tending to support her claim, due to the application of Indiana rules of evidence. Petitioner was denied Equal Protection of the laws in that admissibility of evidence was dependent upon the forum of the litigation rather than upon a uniform application of Section 1983, and for the additional reason that as the first victim of the particular defendant, she had evidence that was inadmissible, but had she been the second, third or fourth victim, the same evidence would have been admissible.

Finally, the failure to apply Federal Rules of Evi-

dence to Section 1983 actions frustrates the intent of Congress by denying the uniform application of the law, and places the state in a supreme position over the Federal Government, contrary to Article 6, Section [2,] of the United States Constitution, by allowing states to have evidentiary codes which would and/or could have the effect of denying to a Civil Rights litigant the ability to successfully prosecute a Section 1983 claim by holding necessary evidence inadmissible as a matter of state law.

This issue is of such constitutional magnitude as to justify the grant of certiorari to review the judgment below.

2. The Indiana state court has decided a federal question of substance not theretofore decided by this Court.

The Federal Constitution is violated by a statute which permits a police officer to use deadly force against a fleeing felon who has not used deadly force in the commission of the felony and whom the officer does not reasonably believe will use deadly force against the officer, or others, if not immediately apprehended.

The Indiana statute in question, I.C. 35-1-19-3 is found in this petition, *supra*. When the trial court denied petitioner's motion to declare that law unconstitutional it did not decide an academic question. The trial court gave respondent's instruction No. 3, over petitioner's objection, and that instruction embodied the challenged statute. Additionally, the viability of this statute directly affected petitioner's right to a judgment as a matter of law and that question was presented to both the Indiana trial and appellate courts. The Indiana statute authorized the taking of human life without Due Process of law. As the opinion of the Indiana Court of Appeals shows, that court refused to decide the issue of the constitutionality of the statute. If that issue cannot be decided in the frame of reference of this case it can never be decided. The reasons petitioner advances in support of her argument are embodied in the court's opinion in the case of *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir., 1976). We are well aware that this Court

vacated that decision and remanded the cause on the grounds that the case did not present a "live 'case or controversy'". *Ashcroft v. Mattis*, 431 U.S. 171, (1977). Petitioner believes that in the *Mattis* opinion the reasoning is definitively sound, the logic irrefutable and the words more eloquent than counsel could muster and so that opinion is adopted as our argument. The reason for this court's vacation of the decision does not exist in the case at bar for the within controversy is live. If the present issue cannot be decided by way of declaratory judgment and if the reasons why the Indiana court rejected decision of the issue persist, then a pernicious statute will go forever unchallenged.

The facts in *Mattis* are remarkably similar to those at bar and of the statutes there involved, Mo. Rev. Stat. § 559.040 and 544.190 (1969); the latter is identical to the one at bar. The portion of the *Mattis* opinion which is most telling is the recitation of certain historical facts: the right to kill a fleeing felon had its genesis in a time when all, or nearly all, felonies were punishable by death. *Mattis v. Schnarr, supra*, at 1011-1012, n. 7. Had Walter Peaches, Jr. lived to be charged with the crime of which he was suspected, he would have been charged with delinquency in a juvenile court as he was seventeen years at the time of the offense. (R. 448) Assuming the worst, that he had been waived to an adult court and found guilty, the maximum sentence he could have received for second degree burglary would have been two (2) to five (5) years. I.C. 35-13-4-4 (b). His action of fleeing from the respondent Zirkelbach could have, at most, gotten him a sentence of six (6) months and a \$500.00 fine. I.C. 35-21-2-1. For what reason, therefore, was a police officer permitted to kill him?

Is it because the state has an interest in keeping felons off the streets, and preventing their circulation among the populace? At the time of the offense here involved, the following, *inter alia*, were classified as felonies under the laws of Indiana: False attestation by a notary, I.C. 35-1-95-5; Counterfeiting union labels, I.C. 35-1-124-6; Desertion of

wife, I.C. 35-14-5-1; Injuring tobacco, I.C. 35-16-3-1; Theft of a trade secret, I.C. 35-17-3-1; Entering a horse under an assumed name, I.C. 35-18-11-1; and Bribing a referee, I.C. 35-18-12-1.

Whether we consider the right of a parent to raise a child, or the right to life itself, there can be no dispute the both rights are regarded as "fundamental" by the Constitution. It is therefore incumbent upon the State to demonstrate a "compelling state interest" which is equivalent to or greater than these fundamental rights. *Roe v. Wade*, 410 U.S. 113, (1973).

What compelling interest does the state have in permitting its police officers to kill suspected nonviolent felons to prevent their escape? This same question is raised in the often quoted statement of Professor Michael Mikell:

"It has been said, 'Why should not this man be shot down, the man who is running away with an automobile? Why not kill him if you cannot arrest him?' We answer: because, assuming that the man is making no resistance to the officer, he does not deserve death * * * May I ask what we are killing him for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? If we catch him and try him, we throw away every protection around him. We say he cannot be tried until 12 men of the grand jury indict him, and then he cannot be convicted until 12 men of the petit jury have proved him guilty beyond a reasonable doubt, and then when we have done all that, what do we do to him? Put him before a policeman and have a policeman shoot him? Of course not. We give him three years in a penitentiary. It cannot be then that we allow the officer to kill him because he stole the automobile, because the statute provides

only three years in a penitentiary for that. Is it then for fleeing? And again, I insist this (is) not a question of resistance to the officer. Is it for fleeing that we kill him? Fleeing from arrest is also a common law offense and is punishable by a light penalty, a penalty much less than that for stealing the automobile. If we are not killing him for stealing the automobile and are not killing him for fleeing, what are we killing him for?" 9 A.L.I. Proceedings 186-187 (1931).

Can a civilized society permit such a law to exist? Is the danger to society so great that it would authorize the killing of those who pose no physical threat to its well being merely because they flee rather than submit to arrest? Such a statute does not comport with the modern concept of Due Process as expressed by this Court in *Joint Anti-Fascist Com. v. McGrath*, 341 U.S. 123, 162-3, (1951).

There are several fairly recent cases which support petitioner's position: *Sauls v. Hutto*, 304 F.Supp. 124, (E.D. La. 1969), *Clark v. Ziedonis*, 368 F.Supp. 544 (E.D. Wis. 1973) and *People v. Cellabos*, 12 Cal. 3rd 470, 526 P.2d 241 (1974).

The correct standard defining the use of deadly force permissible on fleeing felons, in petitioner's view, is found in the *Restatement of Torts*, 2d, § 143 and the Model Penal Code, § 3.07. Since these are both more than minimal in length, they are set out in Appendix D hereafter. They are both consistent with petitioner's view.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Indiana.

Respectfully submitted,

JOHN D. CLOUSE
MICHAEL C. KEATING
1004 Hulman Building
Evansville, IN 47708

JOHN F. DAVIS
504 Hulman Building
Evansville, IN 47708

RICHARD H. ADIN
4824 Lincoln Avenue
Evansville, IN 47715

COUNSEL FOR PETITIONER

¹³
November 2, 1979

APPENDIX A

(OPINION AND JUDGMENT OF
THE INDIANA COURT OF APPEALS)

Attorneys for Appellant:

JOHN F. DAVIS
504 Hulman Building
Evansville, IN 47708

JOHN D. CLOUSE
MICHAEL C. KEATING
1004 Hulman Building
Evansville, IN 47708

RICHARD H. ADIN
4824 Lincoln Avenue
Evansville, IN 47715

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Attorneys for Appellees:

JOHN C. COX
TIMOTHY R. DODD
BARBARA B. WILLIAMS
Law Department of City of
Evansville
522 Main Street
Evansville, IN 47708

Attorneys for Amicus Curiae

FRANK CARRINGTON
Americans for Effective
Law Enforcement, Inc.
960 State National Bank Pl.
Evanston, IL 60201

JOHN C. RUCKELSHAUS
Ruckelshaus, Bobbitt &
O'Connor
120 East Market St., #410
Indianapolis, IN 46204

ROY A. TYLER
219 Southeast Seventh St.
Evansville, IN 47713

IN THE
COURT OF APPEALS OF INDIANA

FIRST DISTRICT

ANN PEACHES,)
Plaintiff-Appellant,)
)
v.) No. 1-878-A-223
)
CITY OF EVANSVILLE, IN)
JOHN ZIRKELBACH,)
Defendants-Appellees.)

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Walter H. Palmer, Judge

ROBERTSON, J.

Plaintiff-appellant Ann Peaches (Peaches) appeals a negative judgment in favor of defendants-appellees City of Evansville (City) and John Zirkelbach (Zirkelbach).

We affirm.

Peaches brought an action in three counts for the wrongful death of her son, Walter Peaches, Jr. (Walter) alleging, *inter alia*, negligent hiring of Zirkelbach by the City, negligence on the part of Zirkelbach in the shooting death of Walter, and deprivation of Walter's civil rights under 42 U.S.C. § 1983. Walter was fatally shot by Zirkelbach, a police officer for the City, when attempting to flee from the scene of a second degree burglary. At the close of the evidence, the trial court gave the following instruction:

If you find from a preponderance of the evidence that Officer Zirkelbach reasonably believed and had probable cause to believe that Walter Peaches was fleeing apprehension for a felony, gave a warning to Walter Peaches of his intention to arrest, and fired at the deceased upon a reasonable belief the shooting was necessary to effect his capture as a last resort, you may find that Officer Zirkelbach was justified in the use of deadly force.

You are further instructed that if Officer Zirkelbach acting in his official capacity as a police officer of the City of Evansville, did, in fact, have probable cause to believe that Walter Peaches had committed a felony on the morning in question, and further that Officer Zirkelbach exhausted all possible means to apprehend Walter Peaches without the use of deadly force and, in fact, used deadly force only as a last resort to apprehend Walter Peaches, after giving notice of his intention to arrest Walter Peaches, you may find that Officer Zirkelbach was justified under law, to use deadly force.

Peaches contends the giving of this instruction was error on the *sole ground* that it established an incorrect standard of conduct because the statute upon which it was based, *IND. CODE 35-1-19-3*,¹ is constitutionally infirm for the reason that it offends the Due Process Clause of the Fourteenth Amendment. The argument proceeds on the assumption that an unconstitutional statute is void *ab initio*; hence, assuming the statute infringes upon due process guarantees, Peaches asserts that Zirkelbach's conduct cannot be ad-

¹ For present law, See IC 35-41-3-3.

judged in accordance therewith.

We decline to reach the merits of Peaches's constitutional challenge for the reason that we are of the opinion Zirkelbach was justified in relying on the presumptive constitutionality of the statute in issue. In related contexts, our courts have held that as a theoretical matter, unconstitutional statutes are void from their inception; as a practical matter, however, statutes have a *semblance* of validity which will protect good faith actions thereunder. See *Saloom v. Holder*, (1973) 158 Ind. App. 177, 304 N.E. 2d 217; *Ulrich, etc. v. Beatty, etc., et al.*, (1966) 139 Ind. App. 174, 216 N.E. 2d 737. As such, we believe Zirkelbach's conduct was properly adjudged in light of statutes in effect at the time of the alleged tort and upon which he relied in good faith. Therefore, our resolution of the constitutional claim would be a fruitless exercise.

The next issue concerns whether the trial court erred in denying a motion by Peaches to use the Federal Rules of Evidence. Peaches argues that since she was attempting to establish a federal claim under 42 U.S.C. § 1983, her federal rights could only be fully protected by the use of the Federal Rules of Evidence. Peaches then directs us, without citation of supporting authority, to certain excluded testimony which would purportedly have been admissible under the Federal Rules. Likewise, Peaches cites no direct authority for the proposition that the F.R.E. must govern. Nevertheless, we find it difficult to believe that our rules of evidence are so restrictive as to deprive citizens of their right to have a full and fair opportunity to vindicate federal rights in the forums of this State. Moreover, Indiana courts are not among those "federal" courts for whom the Federal Rules of Evidence are deemed applicable. F.R.E. 101, 1101. The trial court's denial was not in error.

Peaches next alleges error in the trial court's refusal to permit the testimony of one Ludwig to the effect that Zirkelbach, while off duty, had fired three shots into a van after the van had knocked over some garbage cans in front

of his residence. This incident occurred over two years after the shooting death of Walter. Peaches contends it was admissible in her case-in-chief since it was relevant as "subsequent conduct." The essence of this argument, although couched in various conceptual constructs, is that this incident showed a predisposition or tendency to use deadly force unreasonably. Or, stated differently, Peaches sought to introduce the evidence to show other negligent acts by Zirkelbach as tending to prove that he was negligent in the shooting of Walter. The trial court correctly ruled, however, that Peaches had failed to establish a foundation consisting of similar conditions surrounding both occurrences. Courts are naturally reluctant in a negligence action to admit evidence of other negligent conduct because of the inevitable injection of collateral matters which would unduly hamper the fact-finding process. Thus, the proponent of such evidence must lay a firm foundation of similar circumstances to ensure that the probative force of the proffered testimony will outweigh the injection of extraneous matters. See generally *McCormick's Handbook on Evidence* § 200 (1972). This Peaches failed to do.

Alternatively, Peaches contends that this evidence was admissible to impeach by contradiction Zirkelbach's testimony that he had never used deadly force against a misdemeanant. First, a witness may not be impeached by specific bad acts which have not been reduced to a conviction. *Swan v. State*, (1978) Ind., 375 N.E. 2d 198. Second, impeachment evidence to contradict is admissible only if it could have been introduced in the case-in-chief, i.e., collateral matters are improper for contradiction. *Lee v. State*, (1976) Ind. App., 349 N.E. 2d 214; *Bryant v. State*, (1973) 261 Ind. 172, 301 N.E. 2d 179. As noted above, the evidence was not proper in Peaches's case-in-chief; therefore, it would not have been proper for impeachment purposes. We also note that remoteness in time could have served as a sufficient basis to exclude testimony in the exercise of the trial court's discretion. *Shaw v. Shaw*, (1973)

159 Ind. App. 33, 304 N.E. 2d 536. The evidence was properly excluded.

Peaches next alleges error in excluding testimony to the effect that he told his mother, "They shot me down like a dog", soon after the shooting incident in issue.² It is well settled that we will not reverse a trial court's rejection of evidence unless the evidence is vital to the case and was erroneously refused. *Auto-Teria, Inc. v. Ahern*, (1976) Ind. App., 352 N.E. 2d 774. Again, the test for relevancy is a minimal one; however, relevant evidence may properly be excluded where its probative force is outweighed by its tendency to arouse the emotions of the jury. *Smith v. Crouse-Hinds Company*, (1978) Ind. App., 373 N.E. 2d 923. We confess our inability to discern the relevancy of such testimony to any matter vital to Peaches's case. Moreover, the inflammatory nature of the statement is abundantly clear. Hence, we do not believe the trial court demonstrated an abuse of discretion in excluding the proffered testimony.

Peaches next asserts error in the trial court's denial of her challenge for cause of Timothy Goad during voir dire. Mr. Goad indicated that he favored the defense because he knew the "hassles" police go through. He also stated that if he had a choice he would require Peaches to prove her case beyond a reasonable doubt. Nevertheless, he answered affirmatively to questions propounded by the court to the effect that he would base a decision solely on the evidence introduced at trial, would follow the court's instructions (including proof by a preponderance), and would weigh the credibility of each witness. After reading the record

2 Although the issue is framed as error in the granting of a motion in limine directed to the statement, the grant or denial of such a motion generally occasions no error; rather, it is the admission or exclusion of the evidence at trial which is subject to review. *Marsh v. Lesh*, (1975) 164 Ind. App. 67, 326 N.E. 2d 626.

in this particular, we are satisfied that Mr. Goad was sufficiently impressed with and understood his duty as a juror. As in a criminal case, we think the denial of a challenge for cause should be reviewable only for an abuse of discretion. See, e.g., *Stevens v. State*, (1976) 265 Ind. 396, 354 N.E. 2d 727; *Riggs v. State*, (1976) 264 Ind. 263, 342 N.E. 2d 838. No abuse has been shown.

Peaches next alleges error in the admission of certain business records relating to Walter's term of employment at the Executive Inn. We presume that these records were offered on the issue of damages. It is axiomatic that in addition to establishing error in the admission of evidence, the complaining party must also demonstrate harm or prejudice. *Ashley v. City of Bedford*, (1974) 160 Ind. App. 634, 312 N.E. 2d 863. Since Peaches did not prevail on the issue of liability, error, if any, has not been shown to be harmful since the evidence went only to the issue of damages.

Peaches next alleges error in refusing to give the following tendered instruction:

You are instructed that at the time of this incident there was in force a statute in Indiana which reads as follows:

"If, after notice of the intention to arrest the defendant, he either flees or forcible resists, the officer may use all necessary means to effect the arrest."

If you find by a preponderance of the evidence that at the time and place of the incident in question the defendant violated the above and foregoing statute, without any justification or legal excuse therefor, and that such violation proximately caused the incident and damages complained of, and if the defendants have not proved their affirmative defense, then I instruct

you that the plaintiff, Ann Peaches, can recover and you may return a verdict for her.

Peaches contends she was entitled to this instruction because a violation of the aforementioned statute would be negligence *per se*. We disagree for the reason that in order for a violation of a statute to be negligence *per se*, the statute must prescribe an absolute duty, i.e., the jury need not consider the surrounding circumstances in determining whether the actor exercised reasonable care. *Board of Commissioners of Miami County v. Klepinger*, (1971) 149 Ind. App. 377, 273 N.E. 2d 109. The above statute, however, does not impose an absolute duty irrespective of the particular facts and circumstances. The phrase "the officer may use all necessary means" clearly requires a factual inquiry into the surrounding circumstances and thus falls far short of establishing an absolute duty which will justify liability regardless of the facts accompanying the officer's conduct. As such, the refusal was not error.

Peaches next contends it was error to instruct the jury that a police officer may presume that a statute or regulation is constitutional. See *Wiley v. Memphis Police Department*, 548 F.2d 1247, 1251 (6th Cir. 1977), cert. denied, 434 U.S. 822. We have already stated that Zirkelbach's standard of conduct should be considered in the light of his legitimate reliance on such a presumption and thus need not consider this contention further.

Lastly, we decline the invitation to judicially abrogate the long standing rule in this state that the measure of damages for the wrongful death of a child does not extend beyond the age of majority.

Finding no reversible error, the trial court is in all respects, affirmed.

Affirmed.

Lowdermilk, P. J. and Lybrook, J., concur.

APPENDIX B

(OPINION AND ORDER OF THE INDIANA
COURT OF APPEALS DENYING REHEARING)

Attorneys for Appellant:

JOHN F. DAVIS
504 Hulman Building
Evansville, IN 47708

JOHN D. CLOUSE
MICHAEL C. KEATING
1004 Hulman Building
Evansville, IN 47708

RICHARD H. ADIN
4824 Lincoln Avenue
Evansville, IN 47715

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Indiana Supreme and
Court of Appeals

Attorneys for Appellees:

JOHN C. COX
TIMOTHY R. DODD
BARBARA B. WILLIAMS
Law Department of City of
Evansville
522 Main Street
Evansville, IN 47708

Attorneys for Amicus Curiae

FRANK CARRINGTON
Americans for Effective
Law Enforcement, Inc.
960 State National Bank Pl.
Evanston, IL 60201

JOHN C. RUCKELSHAUS
Ruckelshaus, Bobbitt &
O'Connor
120 East Market St., #410
Indianapolis, IN 46204

ROY A. TYLER
219 Southeast Seventh St.
Evansville, IN 47713

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

ANN PEACHES,)
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JOHN ZIRKELBACH,)
Defendants-Appellees.)

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Walter H. Palmer, Judge

PETITION FOR REHEARING

ROBERTSON, J.

Petitioner Ann Peaches (Peaches) correctly asserts that this court did not reach the merits of various alleged grounds for error with respect to the issue as to whether the trial court erred in failing to declare *IND. CODE* 35-1-19-3 unconstitutional. Our reason for not doing so was based on our decision that regardless of the merits of Peaches's claim, Officer Zirkelbach was entitled to reply on the presumptive validity of the statute in issue. Hence, as the issues were formulated below and on appeal, the constitutionality of the statute was moot. As such, it was unnecessary for us to address the other alleged grounds for error. Again, this conclusion is based on the premise that Zirkelbach was entitled to assume the statute was constitutional, a premise that we here reaffirm. See *Pierson v. Ray*, 386 U.S. 547,

87 S.Ct. 1213 (1967); *Landrum v. Moats*, 576 F. 2d 1320 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 282.

The petition for rehearing is in all respects denied.
Lowdermilk, P. J. and Lybrook, J., concur.

APPENDIX C

(ORDER OF THE INDIANA SUPREME COURT
DENYING TRANSFER)

IN THE

SUPREME COURT OF INDIANA

ANN PEACHES,)	
Plaintiff-Appellant,)	
)	
vs.)	Court of Appeals
)	No. 1-878 A 223
CITY OF EVANSVILLE, IN)	
JOHN ZIRKELBACH,)	
Defendants-Appellees.)	

Appellant's Petition to Transfer DENIED.

Hunter, A.C.J.
ALL Justices Concur.
21st day of September, 1979

APPENDIX D

(RESTATEMENT OF TORTS AND
MODEL PENAL CODE)

Restatement of Torts, 2d, § 143:

"Felonies

(1) Either a peace officer or a private person is privileged to use force against or to impose confinement upon another which is not intended or likely to cause death or serious bodily harm for the purpose of preventing any felony which the actor reasonably believes the other is committing or is about to commit if the actor reasonably believes that the commission or consummation of the felony cannot otherwise be prevented.

(2) The use of force or the imposition of a confinement intended or likely to cause death or serious bodily harm is privileged if the actor reasonably believes that the commission or consummation of the felony cannot otherwise be prevented and the felony for the prevention of which the actor is intervening is of a type threatening death or serious bodily harm or involving the breaking and entry of a dwelling place."

Model Penal Code:

"§ 3.07. Use of Force in Law Enforcement

(1) Use of Force Justifiable to Effect an Arrest. Subject to the provisions of this Section

and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) Limitations on the Use of Force.

(a) The use of force is not justifiable under this Section unless:

(i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(b) The use of deadly force is not justifiable under this Section unless:

(i) the arrest is for a felony; and

(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and

(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(iv) the actor believes that:

(1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed."